LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 305

STANLEY WESTREICH, *Petitioner,*

v.

WALTER P. McFARLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AARON R. FODIMAN
1401 Wilson Boulevard
Arlington, Virginia

MOSES KRISLOV
Hanna Building
Cleveland, Ohio

MAKTOS & MAKTOS
3700 Massachusetts
Avenue, N.W.
Washington, D. C. 20016

ROYALL, KOEGEL, ROGERS & WELLS
1730 K Street, N.W.
Washington, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

STANLEY WESTREICH, *Petitioner,*

v.

WALTER P. MCFARLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on the 24th day of April, 1968.

OPINION BELOW

Neither the United States Circuit Court of Appeals for the District of Columbia Circuit, nor the United States District Court for the District of Columbia rendered any opinion herein. The judgment of the

United States Court of Appeals for the District of Columbia Circuit is annexed as Appendix A, and the judgment of the United States District Court is annexed as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (App. A) was entered April 24, 1968 affirming the judgment of the United States District Court for the District of Columbia (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review a judgment of an United States Court of Appeals.

QUESTIONS PRESENTED

(1) When requisite diversity appears, may a United States District Court dismiss a case on the ground of forum non conveniens rather than transfer the cause to another district where it might have been brought?

(2) When the forum where such action is brought adjoins that contended to be a more appropriate forum, may a District Court invoke forum non conveniens to relieve its calendar congestion (by either dismissal or transfer to another district) if there is no showing of actual inconvenience to the parties or witnesses?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C.A. Sec. 1404

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil

nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

28 U.S.C.A. Sec. 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States; . . .

STATEMENT OF THE CASE.

1. Petitioner, a citizen of the State of Maryland, brought this action for malicious prosecution in the District Court of the District of Columbia against Respondent, a citizen of Virginia. Service was made on Respondent within the District. On motion, the District Court dismissed "for inconvenience of forum" (App. B) and the Court of Appeals affirmed. The Petitioner properly grounded jurisdiction on 28 U.S.C. 1332 (Diversity, and amount in excess of $10,000.00).

2. No contention was made that the forum was inconvenient to the defendant or to witnesses. Rather, Respondent urged that *forum non conveniens* should be invoked in that the litigation arose out of occurrences in Arlington, Virginia and that the District of Columbia Court's docket was crowded. There was no effort made to show that there would be any greater inconvenience in trial in the District Court for the District of Columbia rather than District Court in Alexandria, Virginia or elsewhere in Virginia.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. There is unquestioned federal jurisdiction because of diversity and amount. Dismissal of Plaintiff's cause rather than (at the very least) transfer to a more appropriate forum is error, even if the forum was truly inconvenient. Dismissal squarely conflicts with the rule mandated by Congress in 1948 by enactment of 28 U.S.C. 1404(a). Respondent's contention, accepted by the District and Appellate Courts, is that dismissal is here sanctioned by *Gulf Oil Corp* v. *Gilbert,* 330 U.S. 501 (1947). *Gulf Oil,* however, antedates Revised Sec. 1404. Judge Maris (Chairman of the Judicial Conference Committee which revised Sec. 1404), in *Schoen* v. *Mountain Products,* 170 F. 2d 707 (CA 3, 1948) ruled that after passage of Section 1404(a) a United States District Court could not dismiss a diversity action for *forum non conveniens,* but rather was required to transfer the action to any other district court or division where it might have been brought. Other courts agree: *Collins* v. *American Automobile Ins. Co.,* 230 F. 2d 416 (CA 2, 1956) *cert. den.* 352 U.S. 802, *Savoia Film S.A.I.* v. *Vanguard Films,* 10 F.R.D. 64 (DC NY 1950), *Lapides* v. *Doner,* 248 F. Supp. 883 (DC Mich. 1965), *Harrison* v. *United Fruit,* 141 F. Supp. 35 (DC N.Y. 1953). See also *Burgess* v. *Procter & Gamble Defense Corporation,* 172 F. 2d 541 (CA 5 1949): *Blake* v. *Capital Greyhound Lines,* 95 U.S. App. D.C. 334, 222 F. 2d 25 (CA D.C. 1955); Anno. *Judicial Code: Forum Non Conveniens,* 99 Law. Ed. 799, 806 (1955), Moore, *Commentary on the Judicial Code,* p. 202 (1949). The ruling in this case thus presents a square conflict with the above decisions.

2. Neither dismissal under common law *forum non conveniens* nor a transfer under 28 U.S.C. 1404(a) was warranted here.

Under Section 1404(a), a transfer may be ordered for the convenience of the parties and witnesses. But such inconvenience was not demonstrated. Indeed, the District Court for the District of Columbia is the closest District Court to Arlington, Virginia.

There is no indication in Section 1404(a) or its legislative history (see H.R. Rep. No. 308 80th Cong., 1st Sess., P. A132 (1948) that convenience of a District Court is even a factor to be considered, much less a controlling factor. Sanction of transfer (or dismissal) without regard to convenience of the parties or witnesses and bottomed only on effort of a court to relieve its docket patently would cause a deterioration in working relationships between courts. Equally disturbing is the likelihood that the statute of limitations will deny his day in court to a litigant whose successive petitions are dismissed by successive courts each mindful only of its own calendar congestion.

CONCLUSION

The District Court in ordering the dismissal of Petitioner's cause on the grounds of *forum non conveniens*, erred and violated the requirements of 28 U.S.C. 1404(a) in:

(a) ordering the case dismissed rather than ordering it transferred to another district court; and,

(b) in finding that the doctrine of *forum non conveniens* was applicable.

Respectfully submitted,

AARON R. FODIMAN
1401 Wilson Boulevard
Arlington, Virginia

MOSES KRISLOV
Hanna Building
Cleveland, Ohio

MAKTOS & MAKTOS
3700 Massachusetts
Avenue, N.W.
Washington, D. C. 20016

ROYALL, KOEGEL, ROGERS &
WELLS
1730 K Street, N.W.
Washington, D. C.

Attorneys for Petitioner